United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7441

To be argued by
JOHN C. GRAVEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-7441

MARIA VALENTINO,

Appellee,

— *vs.* —

SWISS FONDUE POT, INC.,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF FOR MARIA VALENTINO

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BRIEF FOR MARIA VALENTINO

PRELIMINARY STATEMENT

Swiss F[illegible]ue Pot, Inc. appeals from a judgment entered on June 3, 1976 following a two day trial before the Honorable Albert W. Coffrin and a jury.

Maria Valentino's Complaint, civil docket number 75-107, was filed in the United States District Court for the District of Vermont on April 29, 1975. Mrs. Valentino charged that Swiss Fondue Pot, Inc., owner and operator of the Swiss Chocolate Pot restaurant in Stowe, Vermont, negligently failed to keep the restaurant in a safe condition, and that as a result, while dining there on July 22, 1974 she tripped over an unlighted step and was severely injured.

Trial commenced on June 2, 1976 and concluded on June 3, 1976 with a verdict finding the restaurant negligently liable and awarding Mrs. Valentino Eighty-Seven Thousand Five Hundred Dollars ($87,500.00).

The Swiss Fondue Pot, Inc. questions only those findings which relate to its liability. No questions are raised as to the size of the award, with which it apparently does not take issue.

STATEMENT OF FACTS

In the evening of July 22, 1974, Maria Valentino, accompanied by her husband and another couple dined at an outside table of the Swiss Chocolate Pot restaurant in Stowe, Vermont. (Tr. 51, 91-92, 138).* At approximately 8:00 p.m., after darkness had fallen, Mrs. Valentino excused herself from the table to go to the ladies room. (Tr. 52, 92-93). The layout of the restaurant was such that as Mrs. Valentino entered the restaurant from the area of the outside tables, the cashier's desk was directly in front of her, the main dining room was to her left and the rest rooms were up a series of stairs approximately three feet to her right. (Tr. 81-83). Immediately to the right of the cashier's desk and covering the three feet to the beginning of the stairs, was a platform, or riser, one step up. (Tr. 81-83, 130, 1[illegible]). This single step up was unlit, and there were no signs or handrails indicating its existence. (Tr. 53-55, 89, 95, 125, 131-133, 140).**

While she had previously dined at the restaurant, Mrs. Valentino had never before had occasion to use the rest rooms or to notice the riser. (Tr. 53, 93). Accordingly, when she entered the main doors, Mrs. Valentino asked the cashier to direct her. (Tr. 93, 128). The cashier simply told her the rest rooms were upstairs to the right. He failed to warn her of the riser. (Tr. 93-94, 110-111, 128-129). After receiving the directions, Mrs. Valentino turned to her right and as she started to walk, tripped over the riser and

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* "Tr." refers to the trial transcript. "Br." refers to appellant's brief.

** Franz Dubach, manager of the restaurant, initially maintained that he had placed the lettering "STEP" in the area of the riser as a warning sometime before July 22, 1974. (Tr. 130-131). Plaintiff's Exhibit 11, a photograph of the area taken March 19, 1975, well after the accident, showed that as of that late date no such warning existed. (Tr. 131-133; PX 11).

fell. (Tr. 93-94, 113-117).* Others had tripped before in the same spot, and according to the restaurant manager himself, there was nothing else in the area for her to trip on. (Tr. 130-131). When Mrs. Valentino was discovered, she had fallen forward on her left side with her legs near the step up to the riser. (Tr. 136).

* The Swiss Chocolate Pot was not a lucky spot for Mrs. Valentino. She had also fallen one year earlier in 1973 while descending the stairs outside the restaurant and sprained her ankle. (Tr. 63-64, 84-85). She fully recovered from the sprain well before her accident on July 22, 1974, and led a very active life. In addition to doing the housework and other routine forms of activity, Mrs. Valentino enjoyed dancing before her accident on the riser.

ARGUMENT

DEFENDANT'S MOTIONS FOR A DIRECTED VERDICT WERE PROPERLY DENIED.

As its sole issue on appeal, Swiss Fondue Pot, Inc. challenges the rulings of the trial court, made at the close of the Plaintiff's case and again after the defense rested, denying its motions for a directed verdict. (Br. 1, 5; Tr. 143, 153). The threshold question, since federal jurisdiction in this instance was founded upon diversity of citizenship, is whether the trial court's rulings should be measured by a federal standard or one based upon Vermont law. *Mehra v. Bentz,* 529 F. 2d 1137, 1138-39 (2d Cir. 1975); *Fortunato v. Ford Motor Company,* 464 F 2d 962, 965 (2d Cir. 1972); *Simblest v. Maynard,* 427 F. 2d 1 (2d Cir. 1970); *O'Connor v. Pennsylvania Railroad Company,* 308 F. 2d 911, 914-15 (2d Cir. 1962); 5A *Moore's Federal Practice,* ¶50.06 at 2347. While the matter is by no means as simple as Swiss Fondue Pot's one sentence recitation would make it appear, we agree with its conclusion that in this instance Vermont law should apply. (Br. 3).*

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* Whether the standard is to be determined by state rather than federal law is an open question in this Circuit. *Mehra v. Bentz, supra,* at 1139 n. 2a. However, this Court has consistently held that where the application of state law and federal law would lead to the same result, state law controls. *Mehra v. Bentz, supra; Fortunato v. Ford Motor Company, supra; O'Connor v. Pennsylvania Railroad Company, supra; Presser Royalty Co. v. Chase Manhattan Bank,* 272 F. 2d 838, 840 (2d Cir. 1959). The federal standard, practically identical to the one employed by the courts in Vermont, has been expressed as follows:

> The evidence must be viewed in the light most favorable to the party other than the movant. The motion will be granted only if (1) there is a complete absence of probative evidence to support a verdict for the non-movant or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair minded men in the exercise of impartial judgment could not arrive at a verdict against him. *Armstrong v. Commerce Corp.,* 423 F. 2d 957, 959 (2d Cir. 1970).

See: Boeing Company v. Shipman, 411 F. 2d 365, 374 (5th Cir. 1969).

Regardless of the standard it uses, this Court must now view the evidence and all inferences most favorably to Mrs. Valentino. *Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 US 690, 696, 82 S. Ct. 1404, 1409, 8 L. Ed. 2d 777 (1962); *Fortunato v. Ford Motor Company, supra; O'Connor v. Pennsylvania Railroad Company, supra; Burleson v. Caledonia Sand & Gravel Co.*, 127 Vt. 594, 255 A. 2d 680 (1969); *Gilbert v. Churchill & Cote*, 127 Vt. 457, 461, 252 A. 2d 528 (1969); *Hedman v. Siegriest*, 127 Vt. 291, 293, 248 A. 2d 685 (1968); *Valente, Guardian v. Commercial Insurance Company*, 126 Vt. 455, 457, 236 A. 2d 241 (1967); *LaFaso v. LaFaso*, 126 Vt. 90, 95, 223 A. 2d 814 (1966).

The standard under Vermont law by which a motion for a directed verdict is measured is typically stated as it was in *Hedman v. Siegriest, supra* at 127 Vt. 293-294:

> In passing on defendant's motion for a directed verdict, the evidence must be viewed in the light most favorable to the plaintiff and the effect of modifying evidence is to be excluded. *Eastman v. Williams*, 124 Vt. 445, 449, 207 A. 2d 146. All conflicts are resolved against the defendant and contradictions and contrary inferences are for the jury to resolve. *Berry v. Whitney*, 125 Vt. 383, 384, 385, 217 A. 2d 41. The motion cannot be granted if there is evidence fairly and reasonably tending to support plaintiff's claim. *Ibid.*
>
> * * *
>
> It is not the province of the court to weigh the evidence and determine which preponderates. Where there is some evidence which tends to support plaintiff's case it is for the jury to consider, construe and decide the case according to the weight it gives the evidence.

Accord: Vosburgh v. Kimball, 130 Vt. 27, 33, 285 A. 2d 766 (1971); *Forcier v. Grand Union Stores*, 128 Vt. 389, 393, 264 A. 2d 796 (1970); *Burleson v. Caledonia Sand & Gravel Co., supra; Hedman v. Siegriest, supra* at 293-294; *Valente, Guardian v. Commercial Insurance Company, supra; LaFaso v. LaFaso, supra.*

Furthermore, according to Vermont law, contradictions and contradictory inferences are for the jury to resolve. *Valente, Guardian v. Commercial Insurance Company, supra* at 457-458. If the evidence affords room for opposing inferences on the part of reasonable men, it is error to direct a verdict. This is so even though the facts are undisputed where fair-minded and unprejudiced men may reasonably differ in the conclusion to be drawn. *Lyndonville Savings Bank and Trust Co. v. Peerless Insurance Company,* 126 Vt. 436, 440, 234 A. 2d 340 (1967).

Measured against this standard, and according to the principles of negligence as stated under Vermont law, it is clear that the trial court correctly allowed the jury to consider Mrs. Valentino's case. There was more than sufficient evidence tending to fairly and reasonably support Mrs. Valentino's claim that Swiss Fondue Pot, Inc.'s negligence was greater than her own, and that it was a proximate cause of her injuries.

As a business invitee of the restaurant, Mrs. Valentino had a right to assume that aside from obvious dangers, the premises were reasonably safe for the purpose they were intended. The restaurant owed her the duty to use reasonable care to see that the premises were in a safe and suitable condition, so that Mrs. Valentino would not be unnecessarily or unreasonably exposed to danger. If a hidden danger existed, known to the restaurant, but unknown and not reasonably apparent to Mrs. Valentino, it had the additional duty to warn her of the danger. *Forcier v. Grand Union Stores, supra* at 394; *Johnstone v. Bushnell,* 118 Vt. 162, 165, 102 A. 2d 334 (1954). The situation created by an unlit step, without a handrail or other warning, fairly and reasonably tends to support Mrs. Valentino's claim that the restaurant was negligent, especially in the context of the cashier's failure to warn her of the step even though others had previously tripped over it. (Tr. 53-55, 89, 95, 125, 130-135, 140, PX 11).*

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* The restaurant does not specifically argue in its brief that there was insufficient evidence to support the jury's finding of its own negligence, but rather addresses itself to the questions of proximate cause and Mrs. Valentino's own negligence. Nevertheless, since the issue was raised in its motion for a directed verdict below, we have answered it here. (Tr. 144, 154).

Once having determined that the restaurant was negligent, the jury considered whether such negligence was a proximate cause of the accident and injuries. As they were properly instructed under Vermont law this meant that they had to find that the consequences flowed in unbroken sequence from the negligence. (Tr. 167). *Rivers v. State,* 113 Vt. 11, 14, 328 A. 2d 398 (1974). This too was fairly and reasonably established by the evidence, albeit largely circumstantial in nature. As amply supported by the record, the facts from which the jury could properly conclude that Mrs. Valentino tripped over the step are as follows:

1. The step was immediately to Mrs. Valentino's right as she asked directions of the cashier. (Tr. 81-83).

2. As Mrs. Valentino started to walk to her right, she took a normal step and then fell down. (Tr. 93-94, 113-117).

3. Mrs. Valentino did not trip over her own feet. (Tr. 114-115).

4. The step was unlit, there was no railing or warning, and Mrs. Valentino was unaware of its existence. (Tr. 53-55, 89, 95, 112, 125, 131-133, 140).

5. There was nothing else between the entry way and the step Mrs. Valentino could have tripped over. (Tr. 130).

6. When she was discovered, Mrs. Valentino had fallen forward and was lying on her left side with her leg near the step. (Tr. 136).

These facts present independent circumstances, which taken together reasonably tend to support the conclusion that Mrs. Valentino tripped over the step. They do not present a series of cumulative inferences one dependent upon the other, but are each testimonial facts clearly observable in the record. Even a cursory review belies the suggestion that upon this record the jury's con-

clusion was prohibitively speculative or conjectured. *Wellman Administrator v. Wales,* 98 Vt. 437, 440 (1925).*

In an effort to create an appealable issue, Swiss Fondue Pot, Inc. has constructed a house of cards which it argues presents proof that the jury piled "inference upon inference" to reach its conclusion in a manner impermissible under Vermont law. To the extent we understand it, Swiss Fondue Pot, Inc. suggests that the only two testimonial facts available to the jury were Mrs. Valentino's statement that she didn't know what caused her to fall and Mr. Valentino's observation after the fall that the area was clear of obstructions other than the step. (Br. 7).** Appellant ignores the fact that its own manager, attending Mrs. Valentino immediately after her fall also observed that "the only thing between the entry way and the stairs for her to trip on was this riser." (Tr. 130). Nor does appellant acknowledge as testimonial facts which could have supported the jury's verdict those six which we listed above. Even discounting any contribution Mr. Valentino may have made, the direct observation of the restaurant manager established that the area was clear of objects other than the step. This observation alone is fatal to the restaurant's syllogism. (Br. 7-8). Furthermore, the restaurant's suggestion that the conclusion that Mrs. Valentino "tripped over some object under the control of the defendant" proceeds only from the fact that she didn't personally know how she came to fall is utterly illogical and virtually ignores the record.

Finally on this point, while Mrs. Valentino contends th. this record does not support an argument that the jury placed

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* Against this compelling cumulative evidence that Mrs. Valentino tripped over the step is the restaurant's suggestion that her ankle, weakened by a sprain one year earlier, happened to collapse just at the moment she moved towards the riser. The argument is preposterous on its face, especially in light of Mrs. Valentino's full recovery from the sprain and her enjoyment of such activities as dancing in the year between her accidents. (Tr. 63-64, 102-103).

** It should be noted that Mrs. Valentino herself could not testify with certainty as to exactly how she tripped or to any of the events immediately subsequent to her fall because she was unconscious from the time of her fall until she awoke in the hospital some three or four days later. (Tr. 95-96).

an inference upon an inference or even drew parallel inferences, the law should be clarified. Since this is a procedural question, the federal law controls. In *United States v. Ravich,* 421 F. 2d 1196, 1204 n. 10 (2d Cir. 1970), this Court specifically rejected the claim that an inference may not be grounded upon an inference, acknowledging that the length of the chain of evidence may affect its probative weight but doesn't render it irrelevant. In Vermont, while the rule proscribing an inference upon an inference nominally survives, the courts have emasculated it by characterizing such factual constructions as parallel inferences. *State v. Fox,* 123 Vt. 82, 86, 181 A. 2d 74 (1962); *Ackerman v. Kogut,* 117 Vt. 40-44, 84 A. 2d 141 (1951); *Cappello's Administrator v. Aero Mayflower Transit Co.,* 116 Vt. 64, 67, 68 A. 2d 913 (1949); *Huestis v. Lapham,* 113 Vt. 191, 198, 32 A. 2d 115 (1943); *Gero v. John Hancock Mutual Life Insurance Co.*, 111 Vt. 462, 479-481 18 A. 2d 154 (1941); 5 ALR 3d 100.

The restaurant further contends that it was entitled to a directed verdict on the issue of contributory negligence. This argument is entirely without merit. Vermont is a comparative negligence state wherein the plaintiff is entitled to recover even though she is negligent so long as her negligence is not greater than the defendant's. 12 V.S.A. §1036. As was observed by the Vermont Supreme Court while considering a "slip and fall" case with facts remarkably similar to those presented here, the function of comparing the parties' relative negligence is a function particularly well suited to a jury, to be interfered with only if the verdict is unreasonable, was a product of misconduct, or was improperly influenced by passion or prejudice. Deciding in the plaintiff's favor in *Shea v. Peter Glenn Shops, Inc.* 132 Vt. 317, 319, 318 A. 2d 177 (1974), the court said:

> The comparative negligence concept has undoubtedly enlarged the fact-finding and fact-evaluating functions of the jury. This was a conscious legislative choice, but a proper allocation of responsibility to the fact-finder, bound to be respected by the courts.
>
> Thus, it was for the jury to say whether the interior arrangements of the store as evidence before them represented circumstances likely to deceive a reasonable man,

> even if not obviously dangerous, to the point of representing some negligence with respect to customer safety. *Johnson v. Bushnell,* 118 Vt. 162, 165-166, 102 A. 2d 334 (1954). Against that must be set the plaintiff's own conduct and regard for her own safety, so that a comparison may be drawn between the negligent shortcomings of the defendant, if any, and of the plaintiff, if any. If the percentage of negligence, as the trier of fact determines it to be, is in favor of the plaintiff, the verdict will stand. *This function is particularly suited to the fact-finding duties of the jury, and will not be interfered with short of a showing tht the verdict was unreasonable or was a product of misconduct by the jury, or was influenced improperly by passion or prejudice. Dashnow v. Myers,* 121 Vt. 273, 282-83, 115 A. 2d 859 (1959) (emphasis added)

As the trial court properly ruled, in this instance, none of the proscribed kinds of conduct took place and it was accordingly for the jury to consider upon all the facts what the relative degrees of negligence were as between Swiss Fondue Pot, Inc. and Mrs. Valentino.

CONCLUSION

The judgment finding the Swiss Fondue Pot, Inc. negligently liable to Maria Valentino and awarding her damages in the amount of Eighty-Seven Thousand Five Hundred Dollars ($87,500.00) should, in all respects, be affirmed.

Dated: Burlington, Vermont
January 26, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

Second Circuit

On Appeal from The United States District Court for the District of Vermont

MARIA VALENTINO, Appellee	)	CIVIL DOCKET NO. 75-107
VS	)	UNITED STATES COURT OF APPEALS DOCKET NO. 76-7441
SWISS FONDUE POT, INC., Appellant.	)	

CERTIFICATE OF SERVICE

I, John C. Gravel, Esquire, Attorney for the Plaintiff-Appellee, MARIA VALENTINO, hereby certify that I served two copies of the Appellee's brief on W. Edson McKee, Esquire, Attorney for the Defendant-Appellant, by mailing to him two copies of the same, postage prepaid, at his address at P. O. Box F, Montpelier, Vermont 05602, on the 28th day of January, 1977.

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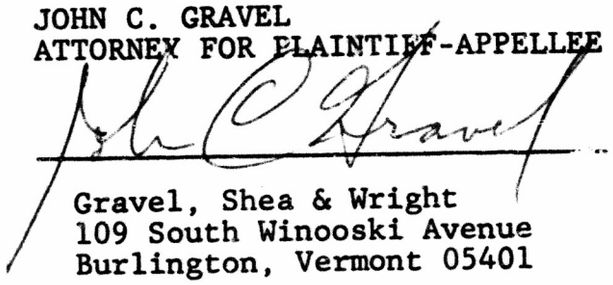

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Dated: January 28, 1977